VETOED MEASURES

CHAPTER 585

HOUSE BILL NO. 1228

(Representatives Grande, Devlin, Koppelman)
(Senators Andrist, Stenehjem)

ADMINISTRATIVE RULES COMMITTEE RULE CALL UP

AN ACT to create and enact a new section to chapter 28-32 of the North Dakota Century Code, relating to authority of the administrative rules committee to call up existing administrative rules for review; to amend and reenact subsection 1 of section 28-32-03.3 of the North Dakota Century Code or in the alternative to amend and reenact subsection 1 of section 28-32-18 of the North Dakota Century Code, relating to authority of the administrative rules committee; and to provide an effective date.

VETO

April 5, 2001

The Honorable LeRoy Bernstein
Speaker of the House
House Chamber
State Capitol
Bismarck, ND 58505

Re: House Bill 1228

Dear Speaker Bernstein:

I am returning HB 1228 and hereby veto the same. The bill would allow the Administrative Rules Committee to void any rule for reasons described in section 28-32-03.3. The Administrative Rules Committee is now limited to voiding any rules prospectively, meaning that it can "call up" only those rules being considered for adoption. Its authority does not extend to existing rules. HB 1228 would expand that authority and allow the Committee to "reach back" and call up any administrative rule regardless of how long it had been in place. My primary concern is the uncertainty that it creates in the business community and amount the taxpayers, who must know the rules under which they make investments and other decisions.

Administrative rules serve a valuable function within government by providing the framework under which many activities are conducted. They represent the Legislature's delegation of its authority to an administrative agency. An administrative rule can only be adopted after careful examination by the agency, approval by the Attorney General as to the rule's lawfulness and a review by the Legislative Council and the Administrative Rules Committee. Only then does a rule become valid.

The State has improved administrative rule making over the past several sessions. We provided the Administrative Rules Committee with limited oversight in 1995, giving the Committee the ability to reject proposed rules. We have required an economic analysis of the regulated community and a takings analysis by the agency. (NDCC 28-32-02.2 and 28-32-02.5) We require the agency to provide the Legislative Council with a copy of the proposed rule (Ch. 286, 1999 S.L.) and require agencies to amend and repeal rules adopted under federal guidelines that are not relevant to North Dakota's regulatory program. (Ch. 289, 1999 S.L.) This session we will require agencies to adopt procedures to allow citizens to request notice when a proposed rule will be reviewed by the Administrative Rules Committee (HB 1027); will require emergency rules to be approved by the Governor in advance (HB 1028); and will require the agency to provide a copy of each written comment and a summary of any oral comment to the Legislative Council as part of the publication of the rule. In short, we are improving the responsiveness of administrative rules. But, I believe we run the risk of going too far with HB 1228.

If there is a need to adjust existing administrative rules, there are a number of ways to do so. For example:

- The agency may review the rule itself.
- A taxpayer has the right to petition the agency for review of the existing rule, which is expressly provided by statute.
- If the taxpayer is dissatisfied with the agency response he can seek assistance from the executive branch or a legislator.
- The courts provide a remedy as well.
- And ultimately, the Legislature as a whole can review and modify any rule it chooses through the passage of a bill.

Finally, I am concerned about the direction we may be taking by expanding the Committee's authority in contravention of the authority of the entire Legislature. HB 1228 contemplates giving the Committee the authority to make law by striking down administrative rules, a direction that runs contrary to constitutional limits. This constitutional problem of delegating authority to a committee has been noted in the bill's own language that contemplates effective dates based upon a finding of unconstitutionality and by Justice Dale Sandstrom in the case of Ecklund v. Ecklund 538, N.W.2d. 182 (N.D. 1995).

I believe we are on the right track regarding administrative rules. I do not want to inject uncertainty into the private sector that needs confidence in the rules upon which it makes decisions. HB 1228 encroaches upon that certainty and the State's ability to provide a friendly arena in which to do business. For these reasons I must return HB 1228 and respectfully veto the same.

Sincerely,

John Hoeven
Governor

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. If House Bill No. 1030 does not become effective, subsection 1 of section 28-32-03.3 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. The legislative council's committee on administrative rules may find that all or any portion of a rule is void if that finding is made within ninety days after review of the rule is reopened under section 5 of this Act, that rule is initially considered by the committee within ninety days after the date of the administrative code supplement in which the rule change appears, or, for rule changes appearing in the administrative code supplement from November first immediately preceding a regular session of the legislative assembly through the following May first, if that rule is initially considered by the committee at the first meeting of the administrative rules committee following the regular session of the legislative assembly. The committee on administrative rules may find a rule or portion of a rule void if the committee makes the specific finding that, with regard to that rule or portion of a rule, there is:

   a. An absence of statutory authority.

   b. An emergency relating to public health, safety, or welfare.

   c. A failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for adoption of the rule.

   d. A conflict with state law.

   e. Arbitrariness and capriciousness.

   f. A failure to make a written record of its consideration of written and oral submissions respecting the rule under subsection 3 of section 28-32-02.

[292] **SECTION 2. AMENDMENT.** Subsection 1 of section 28-32-18 of the North Dakota Century Code as created by section 11 of House Bill No. 1030, as approved by the fifty-seventh legislative assembly, is amended and reenacted as follows:

1. The legislative council's administrative rules committee may find that all or any portion of a rule is void if (a) that finding is made within ninety days after review of the rule is reopened under section 6 of this Act, (b) the rule is initially considered by the committee within ninety days after the date of the administrative code supplement in which the rule change appears, or~~,~~ (c) for rule changes appearing in the administrative code supplement from November first immediately preceding a regular session of the legislative assembly through the following May first, ~~if~~ that rule is initially considered by the committee at the first meeting of the administrative rules committee following the regular session of the

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[292] Section 28-32-18 was created by section 12 of House Bill No. 1030, chapter 293, and amended by section 4 of House Bill No. 1228, chapter 585.

legislative assembly. The administrative rules committee may find a rule or portion of a rule void if the committee makes the specific finding that, with regard to that rule or portion of a rule, there is:

a. An absence of statutory authority.

b. An emergency relating to public health, safety, or welfare.

c. A failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for adoption of the rule.

d. A conflict with state law.

e. Arbitrariness and capriciousness.

f. A failure to make a written record of its consideration of written and oral submissions respecting the rule under section 28-32-11.

SECTION 3. AMENDMENT. If House Bill No. 1030 does not become effective, subsection 1 of section 28-32-03.3 of the North Dakota Century Code as amended by section 4 of chapter 310 of the 1995 Session Laws as amended by section 2 of chapter 279 of the 1997 Session Laws is amended and reenacted as follows:

1. The legislative council's committee on administrative rules may find, for any reason under this subsection, that all or any portion of a rule should be reviewed by the legislative assembly, and the committee may suspend the rule or portion of a rule under this subsection if the suspension is made within ninety days after review of the rule is reopened under section 5 of this Act, the rule is initially considered by the committee within ninety days after the date of the administrative code supplement in which the rule change appears or, for rule changes appearing in the administrative code supplement from November first immediately preceding a regular session of the legislative assembly through the following May first, if that rule is initially considered by the committee at the first meeting of the administrative rules committee following the regular session of the legislative assembly. A rule or a portion of a rule suspended under this subsection becomes permanently ineffective unless it is ratified by both houses of the legislative assembly during the next session of the legislative assembly, in which case it is effective as of the date of ratification by the second house of the legislative assembly. An agency seeking ratification of its rule shall introduce a bill for that purpose. The committee on administrative rules may suspend a rule or portion of a rule if the committee specifically finds that, with regard to the rule, there is:

a. An absence of statutory authority.

b. An emergency relating to public health, safety, or welfare.

c. A failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for adoption of the rule.

d. A conflict with state law.

e. Arbitrariness and capriciousness.

f. A failure to make a written record of its consideration of written and oral submissions respecting the rule under subsection 3 of section 28-32-02.

[293] **SECTION 4. AMENDMENT.** Subsection 1 of section 28-32-18 of the North Dakota Century Code, as amended by section 12 of House Bill No. 1030, as approved by the fifty-seventh legislative assembly, is amended and reenacted as follows:

1. The legislative council's administrative rules committee may find, for any reason under this subsection, that all or any portion of a rule should be reviewed by the legislative assembly ~~and the~~. The committee may suspend the rule or portion of a rule under this subsection if the finding that the rule should be reviewed by the legislative assembly is made within ninety days after review of the rule is reopened under section 6 of this Act, or the rule is initially considered by the committee within ninety days after the date of the administrative code supplement in which the rule change appears, or, for rule changes appearing in the administrative code supplement from November first immediately preceding a regular session of the legislative assembly through the following May first, ~~if that~~ the rule is initially considered by the committee at the first meeting of the administrative rules committee following the regular session of the legislative assembly. A rule or portion of a rule suspended under this subsection becomes permanently ineffective unless it is ratified by both houses of the legislative assembly during the next session of the legislative assembly, in which case it is effective as of the date of ratification by the second house of the legislative assembly. An agency seeking ratification of its rule shall introduce a bill for that purpose. The administrative rules committee may suspend a rule or portion of a rule if the committee makes the specific finding that, with regard to that rule or portion of a rule, there is:

   a. An absence of statutory authority.

   b. An emergency relating to public health, safety, or welfare.

   c. A failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for adoption of the rule.

   d. A conflict with state law.

   e. Arbitrariness and capriciousness.

   f. A failure to make a written record of its consideration of written and oral submissions respecting the rule under section 28-32-11.

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[293] Section 28-32-18 was created by section 12 of House Bill No. 1030, chapter 293, and amended by section 2 of House Bill No. 1228, chpater 585.

SECTION 5. If House Bill No. 1030 does not become effective, a new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Review of administrative rules reopened. The administrative rules committee may reopen review of an administrative rule upon at least thirty days' prior notice to the adopting agency of the time the committee will consider the rule. The committee shall notify the adopting agency of the reason review of the rule is reopened and the adopting agency shall provide a written response to the committee's expressed concerns. A rule for which review has been reopened under this section is subject to the authority of the administrative rules committee under section 28-32-03.3.

SECTION 6. If House Bill No. 1030 becomes effective, a new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Review of administrative rules reopened. The administrative rules committee may reopen review of an administrative rule upon at least thirty days' prior notice to the adopting agency of the time the committee will consider the rule. The committee shall notify the adopting agency of the reason review of the rule is reopened and the adopting agency shall provide a written response to the committee's expressed concerns. A rule for which review has been reopened under this section is subject to the authority of the administrative rules committee under section 28-32-18.

SECTION 7. EFFECTIVE DATE. Sections 1, 2, 5, and 6 of this Act are effective for administrative rules for which review has been reopened by the administrative rules committee after July 31, 2001. Section 3 of this Act is suspended from operation, but becomes effective retroactive to August 1, 1997, upon a ruling by the North Dakota supreme court that any portion of subsection 1 of section 28-32-03.3 as created by section 3 of chapter 310 of the 1995 Session Laws, and as it is subsequently amended, is unconstitutional. Section 4 of this Act is suspended from operation and becomes effective retroactive to August 1, 2001, upon a ruling by the North Dakota supreme court that any portion of subsection 1 of section 28-32-18 as created by section 11 of House Bill No. 1030 is unconstitutional.

Disapproved April 5, 2001
Filed April 11, 2001

CHAPTER 586

SENATE BILL NO. 2012

(Appropriations Committee)
(At the request of the Governor)

INTERSTATE HIGHWAY SPEED LIMIT

AN ACT to provide an appropriation for defraying the expenses of the various divisions under the supervision of the director of the department of transportation; to provide for a legislative council study; to provide a contingent appropriation; to amend and reenact section 39-06-19, subsection 1 of section 39-06.2-09, and section 39-09-02 of the North Dakota Century Code, relating to highways and operators' licenses; and to declare an emergency.

VETO

April 28, 2001

The Honorable Jack Dalrymple
Senate Chambers
President of the Senate
State Capitol
Bismarck, ND 58505

RE: Senate Bill 2012

Dear President Dalrymple:

Attached please find Senate Bill 2012, section 7 of which I hereby veto. Section 7 of the bill increases the speed limit upon the interstate highways of North Dakota to 75 miles per hour. This is a policy I cannot endorse because we do not have adequate enforcement mechanisms in place to accommodate this increase in speed limits.

Specifically, Senate Bill 2088 makes adjustments to the fees and points assessed for speeding, but does not adequately address higher speed limits upon the interstates. In short, we would be left with a higher speed limit, without adequately addressing penalties for exceeding those new limits.

For these reasons, I respectfully veto section 7 of the bill and return it to the Senate.

Sincerely,

John Hoeven
Governor

Disapproved April 28, 2001
Filed May 3, 2001

NOTE: For the full text of Senate Bill No. 2012, including section 7, see chapter 37.

CHAPTER 587

HOUSE BILL NO. 1012

(Appropriations Committee)
(At the request of the Governor)

DEPARTMENT OF HUMAN SERVICES EXECUTIVE BUDGET RECOMMENDATION

AN ACT to provide an appropriation for defraying the expenses of the department of human services; to provide for the transfer of appropriation authority between agencies and institutions; to provide for legislative council studies; to provide an exception to section 54-44.1-06 of the North Dakota Century Code, relating to the preparation of the department of human services appropriations bill for the 2003-05 biennium; to provide statements of legislative intent; to provide an exception to section 54-16-04 of the North Dakota Century Code, relating to emergency commission approval for line item transfers; to provide for basic care facility rates; to create and enact a new subsection to section 50-10-06 of the North Dakota Century Code, relating to eligibility for children's special health services; to amend and reenact subsection 2 of section 25-02-01.1, subsection 3 of section 50-01.2-03.2, and section 50-09-06.1 of the North Dakota Century Code, relating to compensation for members of the state hospital governing body, county reimbursements, and assignment of support rights; to provide an effective date; and to declare an emergency.

VETO

May 9, 2001

The Honorable LeRoy Bernstein
Speaker of the House
North Dakota House of Representatives
State Capitol
Bismarck, ND 58505

Dear Speaker Bernstein:

Pursuant to Article V, Section 9 of the North Dakota Constitution, I have vetoed Section 21 of House Bill 1012 and respectfully return it to the House.

Section 21 would require the Office of the Budget to submit a Department of Human Services appropriation bill for the 2003-05 biennium with the same funding line items and employee levels as authorized by the legislature for the 2001-03 biennium.

I object to this item in HB 1012 because it intrudes upon functions of the executive branch and violates the separation of governmental powers established by the North Dakota Constitution. Furthermore, it is inconsistent with existing statutory law and, finally, would be impractical in its application.

The North Dakota Supreme Court instructs us that the creation, within our constitution, of legislative, executive and judicial branches of government serves to apportion governmental powers. There is an implied exclusion of each branch from

the functions of the others. **City of Carrington v. Foster County**, 166 N.W.2d. 377 (ND 1969).

The function of the executive branches to manage the affairs of the state and that includes the careful budgeting of resources appropriated by the Legislature. This budgeting process necessarily involves making recommendations to the Legislature that contain the executive branch's assessment of the amount and preferred allocation of resources needed to fulfill legislative policies. Section 54.44.1-06, NDCC, codifies these principles.

Section 21 of HB 1012 requires the executive branch to submit an appropriation bill that does not allow for the proper assessment of the needs of the Department of Human Services for the ensuing biennium. In doing this, it interferes with an important executive function.

Furthermore, I believe it is inconsistent with the longstanding procedure for submission of appropriation bills set forth by the Legislature in 54-44.1-06, NDCC. That procedure authorizes the executive branch to use its experience and expertise in submitting a meaningful budget recommendation to the Legislature for its consideration. This process has served North Dakota well for at least the last 18 legislative sessions, and there is no persuasive reason cited in the legislative history of HB 1012 to depart from it.

Finally, Section 21 promises to be impractical in its application. It does not accommodate the changes that occur in an agency as priorities shift and programs change over the course of a biennium.

For these reasons, I have vetoed section 21 of House Bill 1012.

Sincerely,

John Hoeven
Governor

Disapproved May 9, 2001
Filed May 10, 2001

NOTE: For the full text of House Bill No. 1012, including section 21, see chapter 12.

CHAPTER 588

HOUSE BILL NO. 1015

(Appropriations Committee)
(At the request of the Governor)

ELIMINATION OF CERTAIN DEPUTY POSITIONS

AN ACT to provide an appropriation for defraying the expenses of the various divisions under the supervision of the director of the office of management and budget; to provide other appropriations; to provide for various transfers and financial transactions; to provide an exemption from the provisions of section 54-44.1-11 of the North Dakota Century Code; to provide statements of legislative intent; to provide a conditional exemption for certain state property from special assessments for flood control; to provide for additional lodging reimbursement for members of the legislative assembly; to provide levee protection funding authority; to provide for forgiveness of the Fargo family healthcare center debt; to provide for a legislative council study; to create and enact a new section to chapter 15-10, a new section to chapter 54-44.1, and a new section to chapter 65-04 of the North Dakota Century Code, relating to local fund sources for capital construction projects, new building construction cost-benefit analyses, and a state entities workers' compensation account; to amend and reenact section 6-08.3-13, subsection 3 of section 50-01.2-03.2, section 54-16-01, and section 54-23.2-09 of the North Dakota Century Code, relating to interstate banking, county reimbursements, membership of the emergency commission, and provision of 911 services by the state radio communications division; to repeal section 18 of chapter 37 of the 1995 Session Laws and section 12 of chapter 15 of the 1997 Session Laws, relating to the provision of 911 services by the state radio communications division; to provide an expiration date; and to declare an emergency.

VETO

May 9, 2001

The Honorable LeRoy Bernstein
Speaker of the House
North Dakota House of Representatives
State Capitol
Bismarck, ND 58505

Dear Speaker Bernstein:

I have signed House Bill 1015, but respectfully veto section 20 of the bill, pursuant to Article V, Section 9 of the North Dakota Constitution.

Section 20 provides that the Legislature intends that appropriations measures for all agencies with less than 30 FTEs not include funding for deputy positions, and directs the Governor to submit legislation to eliminate the authority to appoint deputies in those agencies.

I cannot support the direction and effect of this legislation for several reasons.

First, it removes the flexibility of administrators to hire staff who serve in unclassified positions in an agency. Eliminating the funding will not necessarily reduce costs, but is likely to have the unintended effect of requiring an administrator to use classified staff, who were hired by previous management and may not share his or her management philosophy.

Second, deputies serve important functions in state government, are relied upon by administrators and elected officials, and often serve in their absence. Eliminating the deputy may impede the orderly and efficient operation of state government.

Third, the section impinges upon the Governor's ability to fashion a budget as directed by North Dakota law. The executive budget recommendation is based upon a careful examination of an agency's needs and funding requests. Section 20 dismisses that process and applies a universal rule without considering the needs and responsibilities of each agency, and approach that will not produce the desired effect.

Finally, I have strong concerns about the Legislature requiring the Governor to introduce legislation, a requirement I believe contravenes the separation of powers doctrine. The bill directs the executive branch to dutifully introduce legislation to meet a legislative objective, with which the Governor may not agree. The Legislature is free to introduce legislation to advance its own objectives without directing the executive branch to do so.

For these reasons, I have vetoed Section 20 of House Bill 1015.

Sincerely,

John Hoeven
Governor

Disapproved May 9, 2001
Filed May 10, 2001

NOTE: For the full text of House Bill No. 1015, including section 20, see chapter 15.

CHAPTER 589

SENATE BILL NO. 2004

(Appropriations Committee)
(At the request of the Governor)

DEPARTMENT OF HEALTH EXECUTIVE BUDGET RECOMMENDATION

AN ACT to provide an appropriation for defraying the expenses of the state department of health; to create and enact a new section to chapter 23-01 of the North Dakota Century Code, relating to a donated dental services program; to amend and reenact subdivision b of subsection 1 of section 14-02.1-02.1 and section 23-01-05 of the North Dakota Century Code, relating to information regarding fetal development and to the qualifications of the state health officer; to provide an exception to section 54-44.1-06 of the North Dakota Century Code, relating to the preparation of the state department of health appropriations bill for the 2003-05 biennium; and to provide statements of legislative intent.

VETO

May 9, 2001

The Honorable Jack Dalrymple
President of the Senate
State Capitol
Bismarck, ND 58505

Dear President Dalrymple:

Pursuant to Article V, Section 9 of the North Dakota Constitution, I have vetoed Section 13 of Senate Bill 2004 and respectfully return it to the Senate.

Section 13 would require the Office of the Budget to submit a Health Department appropriation bill for the 2003-05 biennium with the same funding line items and employee levels as authorized by the legislature for the 2001-03 biennium.

I object to this item in SB 2004 because it intrudes upon functions of the executive branch and violates the separation of governmental powers established by the North Dakota Constitution. Furthermore, it is inconsistent with existing statutory law and, finally, would be impractical in its application.

The North Dakota Supreme Court instructs us that the creation, within our constitution, of legislative, executive and judicial branches of government serves to apportion governmental powers. There is an implied exclusion of each branch from the functions of the others. **City of Carrington v. Foster County**, 166 N.W.2d. 377 (ND 1969).

The function of the executive branch is to manage the affairs of the state and that includes the careful budgeting of resources appropriated by the Legislature. This budgeting process necessarily involves making recommendations to the Legislature that contain the executive branch's assessment of the amount and preferred

allocation of resources needed to fulfill legislative policies. Section 54-44.1-06, NDCC, codifies these principles.

Section 13 of SB 2004 requires the executive branch to submit an appropriation bill that does not allow for the proper assessment of the needs of the Health Department for the ensuing biennium. In doing this, it interferes with an important executive function.

Furthermore, I believe it is inconsistent with the longstanding procedure for submission of appropriations bills set forth by the Legislature in 54-44.1-06, NDCC. That procedure authorizes the executive branch to use its experience and expertise in submitting a meaningful budget recommendation to the Legislature for its consideration. This process has served North Dakota well for at least the last 18 legislative sessions, and there is no persuasive reason cited in the legislative history of SB 2004 to depart from it.

Finally, Section 13 promises to be impractical in its application. It does not accommodate the changes that occur in an agency as priorities shift and programs change over the course of a biennium.

For these reasons, I have vetoed Section 13 of Senate Bill 2004.

Sincerely,

John Hoeven
Governor

Disapproved May 9, 2001
Filed May 10, 2001

NOTE: For the full text of Senate Bill No. 2004, including section 13, see chapter 29.